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Jeff Lorenzo
John Peddycord



PROBATE CODE STUDY COMMISSION

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MEETING MINUTES¹

Meeting Date: October 28, 2004
Meeting Time: 1:00 P.M.
Meeting Place: State House, 200 W. Washington St., Room 404
Meeting City: Indianapolis, Indiana
Meeting Number: 1

Members Present: Rep. Jeb Bardon, Chairperson; Rep. Ralph Foley; Sen. Joseph Zakas; Terry E. Harris; Vincent J. Heiny; Diane L. Bender; Cynthia A. Boll; James W. Martin; Mary Ellen Kiley Bishop; Troy Farmer; John Peddycord.

Members Absent: Rep. Robert Kuzman; Sen. Murray Clark, Vice-Chairperson; Sen. Rose Ann Antich-Carr; Robert B. Christopher; Jeff Lorenzo.

Rep. Bardon called the meeting of the Probate Code Study Commission (Commission) to order at 1:20 p.m. Rep. Bardon explained that after testimony and discussion of each preliminary draft (PD), the Commission would preliminarily approve or disapprove the PD. If the Commission preliminarily approved a PD, the PD would be

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placed into one of two categories-- PDs that the Commission considers to affect revenue, and PDs that the Commission considers not to affect revenue. Each category of PDs would be combined into a single bill that would be introduced in the 2005 regular session of the General Assembly. After discussion of all PDs, the Commission would vote on all of the PDs in each category as a group.

Jeff Kolb, Chairman of the Probate, Trust and Real Property Section of the Indiana State Bar Association (Probate Section), addressed the Commission concerning the PDs that were prepared as a result of the Probate Section's Report to the Commission (Exhibit 1) and the Probate Section's Supplemental Report to the Commission (Exhibit 2):

PD 3500 (Exhibit 3)

Mr. Kolb explained that PD 3500 would allow custodial property under the Uniform Transfer to Minors Act to be transferred to a trust under Section 2503(c) of the Internal Revenue Code. The Commission preliminarily approved PD 3500 by consent 11-0.

PD 3503 (Exhibit 4)

Mr. Kolb explained that PD 3503 coordinates the provisions of IC 30-5-5-9 concerning gift giving to the attorney in fact or the attorney in fact's dependents with the amount allowed as an exclusion under Section 2503(b) of the Internal Revenue Code. The Commission preliminarily approved PD 3503 by consent 11-0.

PD 3505 (Exhibit 5)

Mr. Kolb explained that PD 3505 increases the amount of the inheritance tax deduction for a memorial from \$1,000 to \$5,000. Bill Reynolds, Deputy Inheritance Tax Administrator, Department of Revenue (Department), explained that the deduction has not been increased since 1988, when it was increased from \$500 to \$1000. In response to a question from Sen. Zakas, Mr. Reynolds stated that the Department received approximately 11,000 inheritance tax returns through the fiscal year that ended June 30, 2004 (a figure that includes returns reporting no tax due). He stated that the number of inheritance tax returns filed has decreased over the past few years. Rep. Foley asked Mr. Reynolds if he believed that the fiscal impact of PD 3505 would be significant. Mr. Reynolds stated that the Department does not track individual deductions, so the Department could only estimate the fiscal impact by selecting a sample. Rep. Bardon stated that this PD would be placed in the category of PDs that the Commission believes may affect revenue. The Commission preliminarily approved PD 3505 by consent 11-0.

PD 3507 (Exhibit 6)

Mr. Kolb explained that under current law, a power of attorney terminates upon the death of the principal. He stated that PD 3507 would extend the power of attorney after the principal's death to allow the attorney in fact to make organ donations, request an autopsy, and make burial plans. He recommended that the PD be amended to remove the sentence "This subsection applies to a written power of attorney executed after June 30, 2005" because the Probate Section did not intend to limit the statute's application. He also recommended amending lines 15 through 17 to read "An action taken under this subsection binds the principal and the principal's successor in interest." The Commission consented to the amendment 11-0. Mr. John Peddycord stated that he shares the same concern that Hon. Peter J. Nemeth, Probate Judge of the St. Joseph County Probate Court expresses in the letter received by the Commission (Exhibit 7), that there could be

conflict if both the personal representative and the attorney in fact have the power to make burial plans. The Commission preliminarily approved PD 3507 by consent 11-0.

PD 3508 (Exhibit 8)

Mr. Kolb explained that PD 3508 would allow a person to deposit a will for safekeeping with the Circuit Court Clerk of the county where the testator resided when the will was executed. The PD sets a fee for depositing the will that can be waived by the court. He stated that the PD would make a will easier to locate in the event the attorney who drafted the will dies. The LSA staff attorney explained that she added the provision in the PD that directs the fees to be deposited in the circuit court clerk's records perpetuation fund. The LSA staff attorney indicated that this is just one option for depositing the fees and was included in the PD for discussion purposes. Rep. Foley and Rep. Bardon indicated that they approved of depositing the fees in the records perpetuation fund. The Commission preliminarily approved PD 3508 by consent, 11-0. Rep. Bardon indicated that PD 3508 would be placed in the category of PDs that the Commission believes may have an effect on revenue.

PD 3509 (Exhibit 9)

Mr. Kolb explained that PD 3509 gives an attorney in fact under a power of attorney additional powers with regard to retirement plans. Mary Ellen Kiley Bishop expressed concern that by creating a new, separate section of the Indiana Code for these powers instead of amending them into an existing section, a power of attorney would have to be redrafted in order to incorporate the new powers. James Martin stated that he did not think that a power of attorney would have to be redrafted if it referred to IC 30-5-5-19, which has the effect of incorporating all powers of the attorney in fact. The Commission preliminarily approved PD 3509 by consent 11-0.

PD 3512 (Exhibit 10), PD 3643 (Exhibit 11)

Mr. Kolb explained that PD 3512 makes certain provisions that apply to wills also apply to revocable trusts. He explained that the Probate Section was concerned with the way PD 3512 incorporates the will provisions by reference. The LSA staff attorney stated that PD 3643 is a redraft of PD 3512. PD 3643 makes the will statutes applicable to trusts and provides a reference in the trust code to the location of these provisions. The Commission preliminarily approved PD 3643 by consent 11-0 in place of PD 3512.

PD 3515 (Exhibit 12)

Mr. Kolb explained that PD 3515 amends the current law by removing language that limits when an attorney in fact can be named a beneficiary of a life insurance contract. James Martin pointed out that in this situation, case law makes a rebuttable presumption of fraud. John Peddycord stated that Hon. Peter J. Nemeth, Judge of the St. Joseph County Probate Court was concerned with this expansion of power of the attorney in fact (Exhibit 7). Mr. Kolb commented that the power of attorney is a popular and economical document to execute. Although there are abuses, he stated that the key fact is who the principal selects to exercise the principal's power of attorney. Mary Ellen Kiley Bishop stated that usually the person the principal selects to be an attorney in fact is the most trusted person in the principal's life, and that current law appears to penalize these people who occupy a position of trust. The Commission preliminarily approved PD 3515 by consent 11-0.

PD 3517 (Exhibit 13)

Mr. Kolb explained that PD 3517 clarifies that the three year period in which a will must be probated begins with the decedent's date of death. The Commission proposed amending subsection (d) of the PD to read "The will of the decedent shall not be admitted to probate unless the will is presented for probate not more than three (3) years after the decedent's death." The Commission discussed amending IC 29-1-7-25 concerning foreign wills in a similar fashion, but decided to do this by amendment during the 2005 session, if it was determined to be necessary. The Commission preliminarily approved PD 3517 as amended by consent 11-0.

PD 3518 (Exhibit 14)

Mr. Kolb explained that PD 3518 clarifies that the intestate share of a second or subsequent childless spouse is calculated without the liens and encumbrances on the real property of the deceased spouse. It was pointed out that the PD should be made retroactive to July 1, 2004. Sen. Zakas stated that he questioned whether the use of the word "encumbrance" was too broad, and would include a utility easement. Mr. Kolb responded that the PD merely presents a way to value the property. The Commission preliminarily approved PD 3518 as amended by consent 11-0.

PD 3519 (Exhibit 15)

Mr. Kolb explained that PD 3519 allows a will or revocable trust to incorporate a list of tangible personal property that may be amended after the incorporation. Under current law, amending the list would require amending the will. Terry Harris asked whether an amended list would supercede a will executed before the list was amended. Mr. Kolb stated that in his opinion it would not supercede the will because the will incorporates the list by reference. At the very least, it would create an equitable election, that would require the beneficiary to choose between the bequest in the will and the bequest in the list. The Commission preliminarily approved PD 3519 by consent 11-0.

PD 3520 (Exhibit 16)

Mr. Kolb explained that PD 3520 removes the prohibition against transactions that affect a protected person's guardian, if the transaction is approved by the court. The Commission preliminarily approved the PD 3520 by consent 11-0.

PD 3521 (Exhibit 17)

Mr. Kolb stated that PD 3521 clarifies when there is a disclaimer of an intestate interest. The Commission preliminarily approved PD 3521 by consent 11-0.

PD 3524 (Exhibit 18), PD 3644 (Exhibit 19)

Mr. Kolb explained that PD 3644 is a later version of PD 3524 that contains language that was omitted from PD 3524. As a result the Commission should only consider PD 3644. PD 3644 provides that if a personal representative benefits from a sale, encumbrance, or lease of real property that is an estate asset, the sale, encumbrance, or lease is void unless it is authorized by a will, a trust, the consent of all heirs, legatees, or beneficiaries, or an adjudicated compromise agreement. Vince Heiny proposed an amendment that he distributed to Commission members that makes it clear that a contract entered into between the personal representative as an individual and the decedent could be enforced (Exhibit 20). Mr. Heiny's amendment also provided that a

contract between a trustee as an individual and a settlor could be enforced. The Commission gave the LSA staff attorney permission to amend the Mr. Heiny's amendment to conform with LSA drafting style. The Commission approved the amendment by consent 11-0. The Commission preliminarily approved PD 3644 as amended by consent 11-0.

After a short break, the Commission reconvened without Sen. Zakas in attendance.

PD 3525 (Exhibit 21)

Mr. Kolb explained that PD 3525 was the result of a suggestion from Hon. Charles J. Dieter, Judge of the Marion County Superior Court, Probate Division. This PD allows a person who receives only a specific bequest and does not share in the residue of the estate to only receive an inventory of the estate concerning the person's specific bequest and not an inventory of the estate as a whole. The Commission preliminarily approved PD 3525 by consent 10-0.

PD 3526 (Exhibit 22)

Mr. Kolb explained that PD 3526 allows an adult child to consent to disinterment, disentombment, or disurnment of the decedent's remains if the decedent does not have a surviving spouse. Rep. Foley pointed out that for consistency, the LSA staff attorney inserted the same language in a subsection concerning human remains located on real property owned or leased by a coal company. Vince Heiny pointed out that the statute does not create a priority among the adult children of the deceased which may lead to conflict. Mr. Kolb stated that the intent of the legislation is to add another person who has the power to consent, not deal with the issue of priority. The Commission preliminarily approved PD 3526 by consent 10-0.

PD 3527 (Exhibit 23)

Mr. Kolb explained that PD 3527 was not the result of a recommendation by the Probate Section. The LSA staff attorney explained that this PD was the result of correspondence received by the Commission from Hon. Peter J. Nemeth, Judge of the St. Joseph County Probate Court (Exhibit 24). Judge Nemeth wrote that although IC 29-1-7-5 requires a petition for probate or the appointment of an administrator to state the "age" of the decedent, heirs, legatees, and devisees, the petition often simply states "adult". PD 3527 substitutes "age in years" for "adult". The Commission determined that determining the age in years of each of the parties would be too burdensome, and approved by consent 10-0 an amendment that would take out the "age in years" language and substitute language that the petition must indicate whether the party is an adult or a minor. The Commission preliminarily approved PD 3527 as amended 10-0.

PD 3621 (Exhibit 25)

Mr. Kolb explained that the purpose of PD 3621 is to provide a fixed period of time for a spouse to claim an elective share against the will instead of the variable period of time that is currently in the law. The Commission preliminarily approved PD 3621 by consent 10-0.

PD 3623 (Exhibit 26)

Mr. Kolb stated that PD 3623 incorporates some provisions of the Uniform Trust Code. He explained that the Probate Section determined that there were problems with

adopting the entire Uniform Trust Code and related that Arizona adopted the Uniform Trust Code in its entirety and repealed it a year later. Mr. Kolb pointed out that the PD allows a person to create a pet trust. Terry Harris expressed concern that the provision in the PD that allows an attorney in fact to amend the trust after the settlor becomes incompetent would open the door to thwarting the intent of the settlor. Jim Cousins, Indiana Banker's Association, opposed striking the language in the paragraph located on page 15, lines 15 through 27. In addition, Mr. Cousins stated that a committee of the Indiana Banker's Association studied the Uniform Trust Code and approved of language that would allow a person to petition the court to remove a corporate trustee depending upon a change of the trustee's performance rather than a change in the control of the corporate trustee as the current law and PD 3623 is drafted. Rep. Bardon proposed removing the striking from lines 15-16 and line 27 of the PD. The Commission preliminarily approved PD 3623 by consent, as amended, 10-0.

PD 3624 (Exhibit 27)

Mr. Kolb explained that PD 3624 eliminates the common law presumption that a gift or transaction by a principal that benefits the principal's attorney in fact is invalid. The Commission preliminarily approved PD 3624 by consent 10-0.

PD 3625 (Exhibit 28)

Mr. Kolb explained that PD 3625 adds a provision that allows a trustee or interested person to petition the court to determine heirship. Mr. Kolb explained that this PD is another effort to coordinate the treatment of trusts and wills. The Commission preliminarily approved PD 3625 by consent 10-0.

PD 3626 (Exhibit 29)

Mr. Kolb explained that PD 3626 requires the trustee to determine the beneficiaries of a trust. The LSA staff attorney explained that the language was stricken in SECTION 1 of the PD because it refers to a nonexistent statutory provision. The Commission approved PD 3626 by consent 10-0.

PD 3628 (Exhibit 30)

Mr. Kolb explained that PD 3628 limits the liability of a person who relies on an affidavit asserting the validity of a power of attorney. The Commission preliminarily approved PD 3628 by consent 10-0.

PD 3633 (Exhibit 31), PD 3635 (Exhibit 32), PD 3636 (Exhibit 33)

Mr. Kolb explained that the Probate Section tried to address three issues with these PDs:

(1) During the 2004 session, IC 6-4.1-1-3 was changed to make a stepchild of the decedent a Class A beneficiary (P.L. 69-2004). The first issue the Probate Section wanted to address was to clarify that a stepchild who is adopted by the decedent is a Class A beneficiary. Mr. Kolb indicated that PD 3633 does not address this issue. The Commission decided not to vote on PD 3633 and amend PD 3636 to address this issue instead (See 3 below).

(2) During the 2004 session, IC 6-4.1-1-3(d) was amended to limit the adopted children

who would be treated as natural children of the decedent to children who were adopted by the decedent before being totally emancipated (P.L. 81-2004). PD 3635 addresses the concern of the Commission that adults who were adopted before July 1, 2004 would be penalized. PD 3635 grandfathers in these adults.

(3) The third issue concerns making lineal descendants of stepchildren Class A beneficiaries. PD 3636 addresses this issue. In addition, the Commission discussed amending line 6 to read "(3) a stepchild of the transferor, whether or not the stepchild is adopted by the transferor" to address the first issue. The Commission discussed amending subsection (a)(4) of the PD to remain consistent with the first issue to read "a lineal descendant of a stepchild of the transferor, whether or not the stepchild is adopted by the transferor."

The Commission determined that PD 3635 and PD 3636 belong in the category of PDs that may affect revenue. The Commission preliminarily approved PD 3635 and PD 3636 as amended by consent 10-0.

PD 3637 (Exhibit 34)

Mr. Kolb explained that PD 3637 grants an automatic extension for filing an inheritance tax return if the Internal Revenue Service allows an extension on the federal estate tax return. The Commission preliminarily approved PD 3637 by consent 10-0.

Commission Recommendations and Adjournment

Rep. Bardon summarized the PDS that the Commission believes do not have an effect on revenue: PD 3500, PD 3503, PD 3507, PD 3509, PD 3643, PD 3515, PD 3517, PD 3518, PD 3519, PD 3520, PD 3521, 3525, PD 3644, PD 3526, PD 3527, PD 3621, PD 3623, PD3624, PD 3625, PD 3626, PD 3628, and PD 3637. By a roll call vote of 10-0, the Commission voted that these PDs be recommended to the General Assembly in the Commission's final report.

Rep. Bardon summarized the PDs that the Commission believes may have an effect on revenue: PD 3505, PD 3508, PD 3635, and PD 3636. By a roll call vote of 10-0, The Commission voted that these PDs be recommended to the General Assembly in the Commission's final report.

Rep. Bardon adjourned the meeting at 3:45 p.m.